

JOHN R. MCGINLEY, JR., ESQ., CHAIRMAN
ALVIN C. BUSH, VICE CHAIRMAN
ARTHUR COCCODRILLI
ROBERT J. HARBISON, III
JOHN F. MIZNER, ESQ.
ROBERT E. NYCE, EXECUTIVE DIRECTOR
MARY S. WYATTE, CHIEF COUNSEL



PHONE: (717) 783-5417
FAX: (717) 783-2664
irrc@irrc.state.pa.us
<http://www.irrc.state.pa.us>

INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

April 8, 1999

Honorable M. Diane Koken, Commissioner
Insurance Department
1326 Strawberry Square
Harrisburg, PA 17120

Re: IRRC Regulation #11-149 (#2001)
Insurance Department
Motor Vehicle Physical Damage Appraisers

Dear Commissioner Koken:

Enclosed are our Comments on your proposed regulation #11-149. They are also available on our website at <http://www.irrc.state.pa.us>.

The Comments list our objections and suggestions for your consideration when you prepare the final version of this regulation. We have also specified the regulatory criteria which have not been met. These Comments are not a formal approval or disapproval of the proposed version of this regulation.

If you want to meet with us to discuss these Comments, please contact Chuck Tyrrell at 772-3455 or Fiona Wilmarth at 783-5438.

Sincerely,

A handwritten signature in black ink that reads "Robert E. Nyce".

Robert E. Nyce
Executive Director

REN:wbg
Enclosure
cc: Pete Salvatore
Office of General Counsel
Office of Attorney General
Pete Tartline

COMMENTS OF THE INDEPENDENT REGULATORY REVIEW COMMISSION

ON

INSURANCE DEPARTMENT REGULATION NO. 11-149

MOTOR VEHICLE PHYSICAL DAMAGE APPRAISERS

APRIL 8, 1999

We have reviewed this proposed regulation from the Insurance Department (Department) and submit for your consideration the following objections and recommendations. Subsections 5.1(h) and 5.1(i) of the Regulatory Review Act (71 P.S. § 745.5a(h) and (i)) specify the criteria the Commission must employ to determine whether a regulation is in the public interest. In applying these criteria, our Comments address issues that relate to reasonableness and clarity. We recommend that these Comments be carefully considered as you prepare the final-form regulation.

1. Section 62.1. Definitions. – Clarity.

Aftermarket crash part

The regulation includes the following definition of “aftermarket crash part”:

A replacement for any of the nonmechanical sheet metal or plastic parts that generally constitute the exterior of the motor vehicle, including inner and outer panels.

It appears this definition applies only to original equipment manufacturer (OEM) parts because the proposed regulation contains a separate definition of “nonoriginal equipment manufacturer aftermarket crash part.” The definition of “aftermarket crash part” should be revised to clarify this point. Furthermore, the Department should clarify whether recycled OEM parts are covered by the definition of “aftermarket crash part.”

In its comments, the Insurance Federation of Pennsylvania (IFP) recommended deleting the reference to “sheet metal or plastic” parts because it may not reflect the changing technology in the industry. The Department should ensure that the definition is broad enough so that it does not become obsolete as new materials are used to manufacture parts.

Appraisal

“Appraisal” is defined, in part, as follows:

A written monetary determination of damage incurred to a motor vehicle when the making of such a determination is assigned in order to return the vehicle to its condition prior to the damage in question. (emphasis added.)

To be consistent with the terminology used throughout the regulation, the phrase “condition prior to the damage in question” should be replaced with “predamaged condition.”

Predamaged condition

The definition of this term reads as follows:

The condition of the motor vehicle just prior to the damage in question incurred.

The definition is confusing and hard to read. In its comments, IFP suggests substituting “condition” with “function and appearance” to eliminate the circular reference to “condition.” We suggest the Department revise the definition to read as follows:

The function and appearance of the motor vehicle immediately prior to when the damage in question was incurred.

2. Section 62.2. Licensing requirements. – Clarity.

Additional information for licensure

Subsection (a)(2) provides the following:

The applicant shall provide additional information experience, education or training to the Commissioner or a designee upon request.

It is unclear what additional requirements are contemplated by this provision and under what circumstances an applicant would be subject to the additional requirements. We request the Department clarify when an applicant would be subject to requirements other than those contained in the Motor Vehicle Physical Damage Appraiser Act (Act) and the regulation. Also, the department should insert the word “on” between “information” and “experience” to clarify the sentence.

Determination of trustworthiness

Subsection (b)(3) states that the Department will determine if an applicant possesses the trustworthiness required to conduct motor vehicle appraisals. The regulation does not specify how the Department will make this determination. It is our understanding that the Department will base this determination on the factors listed in Paragraphs (b)(1), (2), (4) and (5). If this is the Department’s intent, we suggest that Paragraph (b)(3) be deleted and that Paragraph (b) be revised to read as follows:

(b) An application for licensing may be denied if the Department determines the applicant does not possess the professional competence and trustworthiness required to engage in conducting motor vehicle appraisals. The Department will base this determination on the following:

3. Section 62.3. Applicable standards for appraisal. – Clarity, reasonableness.

Use of abbreviations

The Department is proposing to delete existing subsection (a)(3), which prohibits an appraisal from using abbreviations or symbols to describe the work to be done unless the appraisal includes an explanation of the symbols and abbreviations. The Department's rationale for deleting this provision is that it has been an automotive industry practice to use abbreviations with definitions, and Section 11(b) of the Act (63 P.S. § 861(b)) requires the appraisal to be legible.

Consumers may not be familiar with the abbreviations used in the automotive industry. Deleting the requirement for definitions of abbreviations and symbols may result in appraisals with terms and notations confusing to the consumer. Since the use of definitions with abbreviations has been an industry standard, retaining this requirement would not be burdensome or unreasonable. Therefore, the Department should retain subsection (a)(3).

Signing the appraisal

Subsection (a) requires the appraisal be "signed" by the appraiser. Some commentators noted that "authenticated" would be a better term because many appraisals are now electronically transmitted. We agree and recommend that the Department replace "signed" with "authenticated."

Excess costs

Subsection (b)(2) requires the following:

A statement that excess costs above the appraised amount may be the responsibility of the vehicle owner.

It is unclear what the term "excess cost" means. We suggest the Department define this term in Section 62.1. *Definitions*.

It is also unclear what recourse the vehicle owner has in disputing the appraiser's determination of excess costs, or in objecting to the appraiser's conduct. Not all consumers may be aware of the option of filing a complaint with the Department. We suggest the Department require the appraisal to include a statement informing the vehicle owner of the right to file a complaint with the Department and providing the address and phone number of the appropriate bureau in the Department.

Recommendation of repair shops

Subsection (b)(3) allows the appraiser to provide the consumer with the names of at least two repair shops able to perform the repairs. This provision raised concerns with several commentators. The IFP believes there is no provision in the Act for the appraiser to make this recommendation. The Pennsylvania Collision Trade Guild also opposes this provision because it is inconsistent with the intent of the Act with respect to customer choice and an appraiser's

independence. We agree. Allowing an appraiser to recommend specific repair shops raises a concern about an appraiser's independence and could influence the consumer's selection of a repair shop.

Section 861 of the Act (63 P.S. Section 861) allows the consumer to select a body shop to perform the repairs. This section also provides that "No appraiser or his employer shall require repairs be made in any specified repair shop" and that the appraiser must make an independent appraisal.

The regulation does not require the consumer to choose the recommended shops. However, the consumer may feel obligated to follow the appraiser's recommendation. Also, the provision may create the appearance that the appraiser is steering consumers to specific repair shops and not performing an independent appraisal.

To avoid these concerns, the Department should delete the provision allowing an appraiser to recommend repairs shops to the consumer.

Description of repairs

This paragraph requires the appraisal to include a "description of repairs necessary to return the vehicle to its predamaged condition." Commentators have suggested adding the phrase "known at the time of the appraisal" after "repairs" to acknowledge that all the repairs that are ultimately necessary to return the vehicle to its predamaged condition may not be known at the time of the initial appraisal. Commentators suggest the same language also be added to Paragraphs (b)(4), (b)(5) and (b)(7). The Department should make this revision.

Depreciation

Also in subsection (b), the Department is deleting the sentence that requires specification of charges relating to several specific items including depreciation. Most of the items in the deleted sentence are included under new Paragraphs 62.3(b)(5), (6) and (7), with the exception of depreciation. It is our understanding that the exclusion of depreciation was simply an oversight. The Department should include the reference to depreciation in the final-form regulation.

Invocation of the appraisal clause

Subsection (b)(4) provides that if there is a dispute about repair costs, the insured or insurer may seek resolution through the invocation of the appraisal clause in the insurance policy. We have two concerns with this provision.

First, some commentators have interpreted this provision as requiring all insurance policies to contain an appraisal clause. The commentators assert such a requirement is not authorized in the Act. It is our understanding that this provision is intended to provide information to consumers about potential options available when a dispute occurs, not to mandate an appraisal clause in all policies. If it is only for informational purposes, the Department should consider whether this regulation is the appropriate vehicle to provide this information.

Second, if this provision is retained, the Department needs to explain what occurs if a consumer's policy does not contain an appraisal clause. That is, what process is to be followed when the consumer and insurer disagree on the appropriate repair costs?

Applicable sales tax

Subsection (b)(6) provides that the appraisal shall contain "the sales tax *on the total dollar amount* of the appraisal." Because not all items in the appraisal may be subject to sales tax, it is not correct to apply the sales tax to the total dollar amount of the appraisal. For example, sales tax does not apply to towing services and storage. Therefore, the appraisal should contain the sales tax only where applicable.

Warranty of Non-OEM parts

Subsection (b)(9) provides that if the use of an aftermarket crash part voids the warranty on the original part, the aftermarket crash part should have a warranty equal to or better than the original part. We have several concerns about the clarity and reasonableness of this provision.

First, Subsection (b)(9) begins by referencing Non-OEM aftermarket crash parts. The last part of the provision relating to warranties simply references aftermarket crash parts. Therefore, it is not clear if the provision relates to just Non-OEM parts or all aftermarket crash parts. The Department should clarify how this provision is to be applied. Also, if the Department's intent is to apply this requirement only to Non-OEM parts, it should explain why the warranty provision should not apply to all other aftermarket crash parts.

Second, we question the intent and reasonableness of the warranty being "equal to or better than the warranty on the original part." The warranty period should only be as long as the remaining portion of the original part's warranty. If the original part had a five-year warranty and was three years old, the warranty on the replacement part should be for two years. The Department should clarify that the warranty for the replacement part must be of the same duration as the remaining time on the original part.

Third, the regulation should clarify who will make the determination that an aftermarket crash part voids the warranty on the original part.

Disclosure of Non-OEM parts

Subsection (b)(9) requires disclosure "if the appraisal includes Non-OEM aftermarket crash parts, a statement the appraisal has been prepared based on the use of aftermarket crash parts supplied by a source other than the manufacturer of the motor vehicle...." We have several concerns and questions related to this new disclosure provision.

First, it is not clear if the appraisal must specifically indicate which replacement parts are Non-OEM or just simply indicate that the appraisal is based on the use of Non-OEM parts. To provide full disclosure and protect the consumer, the appraisal should indicate which parts are Non-OEM parts.

Second, many consumers may not understand the term Non-OEM. In order for the disclosure to be meaningful, the appraisal should include a definition of Non-OEM aftermarket crash part. We suggest the appraisal include the definition of this term found in Section 62.1. *Definitions.*

Third, disclosure is required if the appraisal includes “aftermarket crash parts *supplied* by a source other than the manufacturer of the motor vehicle.” It appears the Department’s intent is to require disclosure of parts not certified or manufactured by the original vehicle manufacturer. Consequently, the Department should replace the phrase “supplied by a source other than” with “not manufactured or certified by.”

Finally, just as a consumer should be aware of the use of Non-OEM parts, a consumer should be informed when recycled OEM parts are used. Therefore, the Department should require disclosure when recycled OEM parts are used.

Salvage requirements in Pennsylvania vehicle code

The Pennsylvania Automotive Recycling Trade Society recommends that subsection (c)(1) be amended to reference Section 1117(a) of the Pennsylvania Vehicle Code. This section requires the filing of an application of salvage with the Department of Transportation. The Department should consider this recommendation to assist the consumer in understanding all requirements for salvaging a vehicle.

Request of the use of other parts

Subsection (d) provides the following:

An appraisal for the repair of the motor vehicle shall be made in the amount necessary to return the motor vehicle to its predamaged condition. If the consumer requests the use of parts other than those listed on the appraisal, or otherwise wishes to repair the motor vehicle to a condition better than that existing prior to the damage incurred, the appraisal need only specify the cost of repairing the vehicle to its predamaged condition. (emphasis added.)

We have two concerns with this paragraph. First, it is unclear if the Department’s intent is to address the issue of excess costs raised in Section 62.3(b)(2). In the existing regulation, this provision follows a paragraph heading relating to “betterment of the vehicle.” This heading has been deleted in the proposed regulation resulting in confusion regarding the difference between Paragraphs (b)(2) and (d). We suggest the Department clarify the intent of this paragraph in the final-form regulation.

Our second concern relates to the phrase “requests the use of parts other than those listed on the appraisal, or otherwise wishes to repair the motor vehicle to a condition better than that existing prior to the damage incurred.” This phrase implies that any time a consumer requests a part other than those listed on the appraisal, the consumer is seeking to restore the vehicle to a condition better than the predamaged condition. There may be instances where the consumer’s request is legitimate. It is unnecessary to refer to the specific case of requesting parts other than

those listed on the appraisal. The heart of the issue is that the appraisal does not need to specify costs of restoring a vehicle to better than its predamaged condition. We suggest the following revision:

...If the consumer wishes to repair the motor vehicle to a condition better than the predamaged condition, the appraisal need only specify the cost of repairing the vehicle to its predamaged condition.

Satisfactorily and reasonably repaired

Subsection (e) uses the phrase “satisfactorily or reasonably repaired” as a decision factor when determining that the appraised value of loss should be the replacement value. It is not clear what will be considered “satisfactorily repaired” or “reasonably repaired.” Furthermore, it is unclear who will make this determination. The Department needs to define these two terms and clarify who makes the determination.

Subsection (e) also contains the phrase “condition just prior to the damage in question being incurred.” For consistency, this phrase should be changed to “predamaged condition.”

Guide sources and replacement value

Subsection (e)(1)(i) provides that the Department will publish a list of approved guide sources once a year. Because this listing is instrumental in the implementation of the regulation, the initial list should be published at the same time as the final-form regulation.

The IFP recommends that the Department also allow the use of electronic data sources as an option for determining the replacement value. The Department should consider the merits of this recommendation.

For consistency, the first sentence of Subsection (e)(1)(ii) should be amended to refer to the “predamaged condition of the motor vehicle” instead of using the qualifier “just prior to the damage in question.”

Total loss evaluation report

Subsection (e)(7) requires the appraiser to send a copy of the total loss evaluation report within five working days of the appraisal’s completion. This paragraph further requires that the consumer be advised of the right to receive a copy of the report within five days. To be consistent, the Department should revise this provision to require that the consumer be advised of the right to “be sent” a copy of the report within five days.

Terminology of salvager and salvage yard

The Pennsylvania Automotive Recycling Trade Society observes that the terms “salvage yard” and “salvager” are outdated and inconsistent with terms used in Pennsylvania statute. Section 1337 of the Pennsylvania Vehicle Code (75 Pa.C.S.A. Section 1337) defines and provides for the registration of “Vehicle Salvage Dealer.” Accordingly, the Department should use this term in place of salvager and salvage yard.

Direct and indirect conflict of interest

The regulation lacks clarity as to how direct and indirect conflict of interest will be defined, especially as it relates to the requirements of the Act. Subsection (f)(9) provides that an appraiser shall:

(9) Not have a **direct or indirect conflict of interest** in the making of an appraisal.... (emphasis added.)

The Act (63 P.S. § 861(f)(2), (3) and (4)) provides the following:

(f) Every appraiser shall:

* * * *

(2) Approach the appraisal of damaged property without prejudice against, or favoritism toward, any party involved in order to make fair and impartial appraisals.

(3) Disregard any efforts on the part of others to influence his judgment in the interest of the parties involved.

(4) Prepare an independent appraisal of the damage.

* * * *

Subsection (f)(9) reinforces the independence requirements contained in the Act. However, it is not clear what the Department regards as a “direct or indirect conflict of interest.” Given that appraisers may be independent contractors, employees of an appraisal firm or employees of an insurance company, the Department should define “direct conflict of interest” and “indirect conflict of interest” in Section 62.1. *Definitions*.

Reappraisal

The Department is deleting Subsection (g), relating to the ability to conduct more than one appraisal, because it serves no purpose and does not enhance the provisions of the Act. This provision should be retained because it will provide notice to consumers and insurance companies that they may seek more than one appraisal. It also provides notice that the original appraiser may need to make a second appraisal based upon new information.